Supreme Court, U. S.
FILED
DEC 12 1977
MICHAEL RODAK, JR., CLERK

No. 77-843

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, A.D. 1977

BENTON M. HENSLER
Petitioner,

vs.

MARY LEE NICHOLS
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dean E. Richards,
156 E. Market 7th Floor
Indianapolis, Indiana
Counsel for Petitioner

Irving L. Fink
602-5 Board of Trade Building
Indianapolis, Indiana
Attorney for Respondent

INDEX

Page

The Opinion Below.....2
Statement of the Jurisdiction.....2
Questions Presented.....2
Constitutional Provisions Involved.....5
Statement of the Case.....5
Reasons for Granting Writ.....6
Conclusion.....13

APPENDIX A

January 6, 1976 decision.....

APPENDIX B

September 13, 1977 decision.....

AUTHORITIES CITED

Nichols vs. Hensler, 528 F 2d 304.....1
Hylek vs. Hylek, 148 F 300 (7th Cir. 1915).....8
In Re Adams, 25 F 2d 640 (2nd Cir. 1928- decision by Learned Hand).....8
Edmonson vs. Edmonson, 242 SW2d 730 (Mo. 1951).8
Zwick vs. Freeman, C.A.N.Y. (1962) 373 F2d 110.9
Shula vs. Shula, 132 N.E.2d 612.....10
Sidebottom vs. Sidebottom, 225 N.E.2d 772.....10
Smith vs. Smith, 169 N.E.2d 130.....10
McDaniels vs. McDaniels, 201 N.E.2d 215.....10
In Re Webb, 106 F Supp. USDC 544.....11
Ceiga v. Ceiga, 51 N.E.2d 493.....11

IN THE
SUPREME COURT OF THE UNITED STATES
December Term, A.D. 1977

No. _____

BENTON M. HENSLER
Petitioner,

vs.

MARY LEE NICHOLS
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of the lower court, dated January 6, 1976, and dated September 13, 1977, which resulted in affirming a lower court judgment that a certain obligation of Petitioner was not dischargeable in bankruptcy.

THE OPINION BELOW

The final opinion of the Seventh Circuit in this cause was unpublished per curiam order. The previous opinion remanding the cause, dated January 6, 1976, was cited as Nichols vs. Hensler, 528 F.2d 304.

STATEMENT OF JURISDICTION

The denial of the petition for rehearing of the lower court decision by the Seventh Circuit took place on September 13, 1977. The statutory provision believed to confer jurisdiction upon this Court is Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a judgment for money based on an Indiana divorce decree is a dischargeable debt in bankruptcy if it is in the nature of a settlement of property rights as opposed to an order for support and maintenance. In the January 6, 1976, decision by the Seventh Circuit in its opinion vacated the lower court's judgment and remanded with directions to try the issue of whether the alimony awarded under Paragraph 11 of the Agreement represented a further division of the marital property or was based on the income of the parties. Said hearing was held and the lower court entered an order holding that said Paragraph 11 of the Property Settlement was based on incomes of the parties to this action. The Seventh Circuit, in its decision, stated as follows:

> The question remaining is the basis for the alimony payments in issue. The obligation to make

> those payments had its inception in the "Property Settlement Agreement," which, as we said above, the divorce decree describes as an agreement "to divide all of the marital property" and approves as "a fair and equitable division of the marital property." This language in the decree, without more, would support an inference that the agreement served only to divide the marital property. But since the decree also incorporates by reference the entire agreement, we must consider the agreement itself as if it were part of the division of the marital property. As we have noted, the agreement allocates specifically described real estate, securities, automobiles, insurance policies and other property between the parties; provides for cross-payments of cash adjustments specifically related to items of the allocated property; and then provides for the alimony payments in question here, as well as additional alimony payments which differ from those before us because they are terminable upon the wife's remarriage. The argument could thus reasonably be made that the marital property is divided in the portion of the agreement which purports to do so, and that the alimony payments are intended to balance the incomes of the parties. We cannot conclusively determine that this is the case, however, because the agreement does not state whether the property described and allocated therein is all the marital property. It is,

therefore, impossible to determine on the record before us whether the alimony provision represents a division of other marital property not described in the agreement, in which case it would be dischargeable in bankruptcy, or whether it was not intended to be a division of property but was instead based on the incomes of the parties, in which case it would not be dischargeable.

That on September 13, 1977, the Seventh Circuit concluded that there was support in the record for the District Court's finding that the payment in issue was intended as support for the wife, rather than as a part of the division of property between the parties and that said finding of the lower court was not erroneous. Testimony was presented by the Petitioner and not contradicted by the Respondent that thousands of dollars worth of property not mentioned in the settlement that was retained by the Petitioner to offset the payments made to the Respondent under Paragraph 11 of the Decree. The property mentioned was the Brunswick common stock, American Airlines common stock, 1958 Chevrolet, Operating Account for Petitioner's medical practice, accounts receivable from Petitioner's medical practice, cash for payment of attorney fees, Penn-Mutual Insurance accounts, cemetery lots, stock in Anderson Country Club and stock in Edgewood Country Club.

2. The United States District Court for the Southern District of Indiana did not have jurisdiction to enforce the judgment for the reason that the monies awarded to the Respondent in the Property Settlement Agreement under Paragraph 11 was changed into a simple money judgment by the said lower court and that the bankruptcy court had discharged the debt and barred enforcement thereof and that said obligation was no longer in the nature of an alimony or even a property settlement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States prohibits the taking of property without due process.

STATEMENT OF THE CASE

The Petitioner appealed to the Seventh Circuit from an Agreed Entry enforcing collection of a judgment of One Hundred Seven Thousand Five Hundred Eighty Eight Dollars and Forty Three Cents ($107,588.43) which was rendered in the same court some three (3) years earlier. The obligation arose under a Property Settlement Agreement incorporated into a Divorce Decree dated April 29, 1960. Proceedings Supplemental was commenced in the District Court and was continued while a Petition in Bankruptcy was filed listing the judgment as a debt subject to discharge. A discharge was received from Bankruptcy Court and proceedings were then continued to collect the judgment below. Finally, an Agreed Entry for minimum payments was

entered after the court below indicated they would enforce the judgment and appeal rights were preserved. A dispute arose over the question of whether the Bankruptcy Court discharged the payment of the judgment and the question was then raised as to whether the court had jurisdiction because said judgment was rendered under a diversity claim by the Respondent and a money judgment was rendered changing the nature of said obligation from either alimony or property settlement to a simple money judgment. The Seventh Circuit remanded said matter without specifically addressing itself to the arguments set out in Petitioner's Brief, dated May 1, 1975, and remanded for a hearing solely on for the lower court to address itself to the issue of whether additional evidence could be obtained to determine whether the Divorce Decree Property Settlement Provision, Paragraph 11, referred to the further division of the property between the parties, or, was a provision for continued support to the Respondent.

REASONS FOR GRANTING WRIT

The Seventh Circuit failed to give a decision of a substantial question arising in Petitioner's Briefs as to whether the District Court had jurisdiction to enforce the judgment for the reason that the Bankruptcy Court had discharged the debt and barred enforcement thereof. The District Court assumed jurisdiction over enforcement and collection of a divorce decree rendered in the Marion County Superior Court, in Indianapolis,

Indiana, even though the District Court for the Southern District of Indiana also sits in Marion County, in the City of Indianapolis, and in the State of Indiana. Thus, the novel question arises as to why a Federal District Court is asked to render a money judgment in a diversity case wherein the divorce decree was handed down in a state court in the same city wherein the Federal Court sits and accepted jurisdiction. The Petitioner argues that the rendering of a money judgment in the District Court in the amount of One Hundred Seven Thousand Five Hundred Eighty Eight Dollars and Forty Three Cents ($107,588.43) turned the nature of Petitioner's obligation into a simple money judgment and the question of whether the Divorce Decree Provision, Paragraph 11, pertained to alimony or settlement became moot. Petitioner filed a Petition in Bankruptcy in the District Court for the Southern District of Indiana and listed said money judgment in said Petition and said Bankruptcy Court discharged the debt and barred enforcement thereof. Said Petition in Bankruptcy was filed after the Respondent's Complaint for Proceedings Supplemental was filed in the District Court. The District Court entered a Summary Judgment against the Petitioner and an appeal was taken therefrom to the Seventh Circuit where the Petitioner raised three specific issues, namely:

1. The ex-wife's claim for "alimony" is for a sum owing as property settlement and not for continued support and maintenance.

2. A judgment for money based on an Indiana divorce decree is a dis-

chargeable debt in bankruptcy if it is in the nature of a settlement of property rights as opposed to an order for support and maintenance.

3. The United States District Court for the Southern District of Indiana did not have jurisdiction to enforce the judgment for the reason that the Bankruptcy Court had discharged and barred enforcement thereof.

In support of said issues, the Petitioner argued that Indiana is a property settlement state and, therefore, an award for a sum to be paid over a period of years would be for settlement of property rights only and that such a sum becomes a debt which is dischargeable in bankruptcy. Case authorities are unanimous in supporting this position. Hylek v. Hylek, 148 F. 300 (7th Cir. 1915); In Re Adams, 25 F.2d 640 (2nd Cir. 1928- decision by Learned Hand) and Edmondson v. Edmondson, 242 SW2d 730 (Mo. 1951). The Divorce Decree in question contains the following language which incorporates the Property Settlement Agreement:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Property Settlement Agreement heretofore entered into by and between the parties is approved and the same is made a part thereof. (Page 2 of Decree)

The Petitioner argues that, in this case, it is evident that the Divorce

Decree adopted the Property Settlement Agreement without reiterating the reasons thereof, except for restating the provisions of child support and custody. It mattered not that the United States District Court for the Southern District of Indiana used the language "alimony" when it found the Petitioner liable to the Respondent for the sum of One Hundred Seven Thousand Five Hundred Eighty Eight Dollars and Forty Three Cents ($107,588.43). As stated in the above cited cases, the Bankruptcy Court can look behind the judgment to see whether the amount, or any part of it, is dischargeable.

The Petitioner further argued that a discharge in bankruptcy does not remove the debt, but does bar enforcement thereof. Zwick v. Freeman, C.A.N.Y. (1962), 373 F.2d 110. Thus, on the legal arguments above stated, the debt was dischargeable; therefore, the District Court below erred in enforcing. Upon appeal, the Seventh Circuit failed to address itself to the question raised in Petitioner's Brief which showed that the Petitioner had filed a Verified Petition In Bankruptcy, and that Petitioner further filed in the District Court a Motion to Dismiss, which the lower court refused to sustain. The lower court erred when it proceeded to enforce the money judgment and the proceedings supplemental action after knowing of the Discharge in Bankruptcy Court. The lower court had before it all the evidence showing the Divorce Decree, incorporating the provisions of the parties' "Property Settlement Agreement," which by Indiana law,

made it dischargeable in bankruptcy. As stated in Zwick v. Freeman, Supra, the debt is not removed, but enforcement thereof is barred.

In Indiana, the word "alimony" is awarded for the purpose of making the present and complete settlement of the property rights of the parties, and it does not include future support for the wife. Shula v. Shula, 132 N.E. 2d 612; Sidebottom v. Sidebottom, 225 N.E. 2d 772. In some jurisdictions, it seems that the word "alimony" describes the payments for continued support of a former wife by her former husband. This is not true in Indiana. "Alimony" as it is known in Indiana is not in the nature of support in the future for a wife. The wife's economic situation and ability or inability to support herself is not a proper ground upon which to base a determination to allow or not allow alimony and neither statute nor common law makes it obligatory upon a trial court in divorce proceedings to show alimony. Former Burns Annotated Statute §3-1217, §3-1218; Smith v. Smith, 169 N.E. 2d 130. Thus, it is obvious that there is a variance between the word "alimony" as to the legal meaning in Indiana and as it is used in Section 17(a)(7) of the Bankruptcy Act. In Indiana, alimony is the adjustment of property rights and an award of a lump sum which cannot be modified. Periodic payments may be allowed, but this is an accommodation to the husband and does not change the nature of the award. McDaniels v. McDaniels, 201 N.E. 2d 215.

That a U. S. Federal District Court in Indiana has recognized that under Indiana law in settling property settlement contracts of the parties and, if they are fair, approve such agreement and the effect of such a method is to enforce the validity of contracts, and obligations imposed on husbands will be in complete discharge of the husband's legal obligation to wife. See: Former Indiana Burns Statutes §3-1218, §3-1219(a); In Re Webb, 160 F. Supp. USDC 544. That further, the divorce decree contains characterizations of a "property settlement agreement" and not of "alimony". The Decree states:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Property Settlement Agreement heretofore entered into by and between the parties is approved and the same is made a part thereof.

The heading at the top of the Agreement itself labels it as a "Property Settlement Agreement" and the language which labels the payments called for by the above quoted Paragraph 11 as "Alimony" cannot be given force and effect because of the characterization imposed upon the said Agreement in the Divorce Degree, ie., "Property Settlement Agreement". Under Indiana law, a divorce alimony agreement is given recognition by the court granting a decree. Ceiga v. Ceiga, 51 N.E. 2d 493.

The District Court was presented facts in the rehearing by the Petitioner and the Respondent on the issue as set down

by the Seventh Circuit to determine "whether the alimony awarded under Paragraph 11 of the Agreement represented a further division of marital property or was based on the incomes of the parties." The circuit court further stated that "of greater significance would be evidence of the existence or non-existence of other marital property not specifically described and allocated in the agreement." The Petitioner, in direct testimony, testified that he was able to retain marital property not specified and allotted in the Property Settlement as follows: Operating Account for his medical practice, approximately Five Thousand Dollars ($5,000.00); cash in the approximate sum of Nine Thousand Dollars ($9,000.00) to pay attorney fees; 1958 Chevrolet, worth approximately Five Thousand Dollars ($5,000.00); Twelve Thousand Dollars ($12,000.00) in a savings account with Penn-Mutual Insurance Company; Six (6) cemetery lots, exact value unknown; stock in the Anderson Country Club and Edgewood Country Club; Accounts Receivable in his practice, worth Thirty Five Thousand Dollars ($35,000.00). Thus the Petitioner showed marital property that he retained in excess of Sixty Six Thousand Dollars ($66,000.00) not including the Country Club stock and cemetery lots. Petitioner argues that the Seventh Circuit erred in holding that the findings of the District Court were not erroneous and that the Paragraph 11 referred to and was intended as support for the wife, rather than as a part of the division of property between the parties.

CONCLUSION

Petitioner prays that a Writ of Certiorari issue and that the decision of the Seventh Circuit be reviewed and remanded for further proceedings not inconsistent with an appropriate opinion.

DEAN E. RICHARDS

Attorney For Petitioner

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1074

MARY LEE NICHOLS,

Plaintiff-Appellee,

v.

BENTON M. HENSLER,

Defendant-Appellant.

Appeal from the United States District Court,
Southern District of Indiana,
Indianapolis Division
No. IP 72 C 445
CALE J. HOLDER, *Judge.*

ARGUED OCTOBER 31, 1975 — DECIDED JANUARY 6, 1976

Before STEVENS, *Circuit Justice,** TONE, *Circuit Judge*, and HOFFMAN, *Senior District Judge.***

TONE, *Circuit Judge.* The issue before us is the dischargeability in bankruptcy of an obligation to make payments labeled "alimony" in a 1960 Indiana divorce decree. The District Court, without hearing evidence bearing on the issue of dischargeability, entered judgment in favor of the former wife, holding that the obligation was not discharged. We vacate the judgment and remand for a hearing.

* Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

** Senior District Judge Julius J. Hoffman of the Northern District of Illinois is sitting by designation.

Before the entry of the divorce decree the parties entered into a written "Property Settlement Agreement." This agreement allocated between the husband and wife specifically described property, including real estate, securities, automobiles, and insurance policies. It also provided for adjusting payments of cash from one party to the other with respect to certain items of the allocated property. The husband was to pay "for the special care and maintenance" of one of the four minor children of the marriage. Then followed the paragraph creating the obligation which is in issue in the case at bar.

> "11. The HUSBAND shall pay to the WIFE a sum certain of One Hundred Twenty-one Thousand Dollars ($121,000.00) in equal monthly installments of One Thousand Dollars ($1,000.00) each, the first installment of which shall be due and payable on or before the first day of each calendar month thereafter, until One Hundred Twenty-one (121) of such installments have been paid; and it shall be agreed between HUSBAND and WIFE that the sum of Two Hundred Fifty Dollars ($250.00) of each said monthly installments shall be considered as payment to WIFE for the support and maintenance of such minor children as shall be in her care and custody; the balance of such monthly installments shall be considered as payment by HUSBAND to WIFE for and as payment of alimony."

The husband further agreed, in paragraph 12, to pay to the wife "an additional sum certain" of $30,000.00 "as and for alimony," to be paid in $500.00 monthly installments, which terminated upon the wife's remarriage. The husband was also required to maintain life insurance to cover unpaid alimony payable under paragraph 11, but not under paragraph 12.

The divorce decree recited that in the agreement the parties had agreed "to divide all of the marital property," subject to the court's approval and the awarding of a divorce decree, and that the agreement "is a fair and equitable division of the marital property. . . ." The agreement was also approved and incorporated by reference into the decree as a part thereof.

Some time after the divorce, the former wife remarried, whereupon the former husband stopped paying not only the $500.00 per month provided for in paragraph 12 of the agreement but also the $1,000.00 per month called for in paragraph 11. Both parties having moved to California, the former wife sued in a court of that state for the unpaid paragraph 11 alimony and recovered a default judgment for the amounts then owing. The former husband later returned to Indiana, where, in 1970, he was sued again by the former wife, this time in a diversity action in the District Court. The court, in May of 1971, awarded the plaintiff $82,000.00 "for unpaid alimony, including the amount which was merged in the California judgment," interest of $21,525.00, plus $4,063.43 "additional on the unpaid California judgment for payments made by plaintiff on defendant's behalf, and attorney fee," all coming to a total of $107,588.43. No appeal was taken from that judgment.

In early 1972, plaintiff initiated supplementary proceedings in the District Court to effect collection of her 1971 judgment. Thereafter defendant filed a petition for bankruptcy, listing plaintiff's judgment as a debt subject to discharge, and the supplementary proceedings were continued pending the action of the bankruptcy court. The referee in bankruptcy entered an order in August 1973 releasing the defendant from "all dischargeable debts," making specific exception for debts excepted from discharge under section 17a of the Bankruptcy Act, 11 U.S.C. §35.

Defendant then filed a motion to dismiss the supplementary proceeding on ground that the debt had been discharged in bankruptcy. The court, on June 12, 1974, denied the motion without hearing evidence and set an "evidentiary hearing at a later date." After the initiation of further proceedings aimed at discovering assets available to satisfy the judgment, the parties consented to an "agreed entry," made on September 9, 1974, in which defendant was ordered to pay $100.00 per week to the clerk of court to be applied against the 1971 judgment. The agreed entry reserved to defendant his right to appeal "any of the Court's rulings in the matters herein." This appeal followed.

Our initial concern is whether we have jurisdiction to review an "agreed entry" purporting to preserve defendant's right to appeal. The June 12 order, denying the motion to dismiss the proceeding on the ground that the debt had been discharged in bankruptcy, was not a final disposition of the merits because of the provision setting an "evidentiary hearing" for a later date. As it turned out, the evidentiary hearing the court had in mind was not to hear evidence bearing on dischargeability but only to inquire into the availability of assets to satisfy the judgment: but this was not apparent from the June 12 order itself, and that order was therefore not final and appealable. The first order that finally determined the issue of dischargeability was thus the order of September 9, which required defendant to make weekly payments to the clerk. Defendant did not acquiesce in the ruling on dischargeability by agreeing to the entry of that order. The reservation of the right to appeal makes it clear that he agreed only to make payments which would be applied toward satisfying the judgment if it was ultimately sustained. He is therefore not foreclosed from appealing the ruling on dischargeability. A timely notice of appeal from the September 9 order having been filed, we have jurisdiction to hear the appeal.

Section 17a(7) of the Bankruptcy Act provides in pertinent part:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (7) are for alimony due or to become due, or for the maintenance or support of wife or child. . . ."

Despite the parties' express description of the obligation created by paragraph 11 of the 1960 agreement as "alimony," defendant maintains that section 17a(7) does not except that obligation from discharge, because, under the terms of divorce decree and in view of the unusual view of alimony taken by Indiana law, the obligation was incurred as an element of a property settlement rather than for support of the wife. The issue before us, then, is whether the term "alimony" as used in the agreement, which was incorporated by reference in the divorce decree,

refers to the type of obligation contemplated by the term "alimony" in the Bankruptcy Act.*

The authorities are clear, and the parties do not dispute, that "alimony" in section 17a(7) of the Bankruptcy Act means payments in the nature of support for a former spouse. See *Norris* v. *Norris*, 324 F.2d 826, 828 (9th Cir. 1963); *In re Baldwin*, 250 F.Supp. 533, 534 (D. Neb. 1966); 1A *Collier on Bankruptcy*, ¶17.23, at 1678 (1975); 3A *Collier on Bankruptcy*, ¶63.13, at 1839 (1975); *cf. Wetmore* v. *Markoe*, 196 U.S. 68, 73-74 (1904). If the debt is determined to be one arising under a property settlement, it is discharged by bankruptcy. *Caldwell* v. *Armstrong*, 342 F.2d 485, 488 n.5 (10th Cir. 1965); *Goggans* v. *Osborn*, 237 F.2d 186, 189 (9th Cir. 1956); see also *Edmondson* v. *Edmondson*, 242 S.W.2d 730, 736 (Mo. App. 1951).

The law concerning the purpose of an "alimony" award in Indiana is not entirely clear. There are cases which adopt the conventional definition of alimony as "an allowance out of the divorced husband's estate made to the divorced wife for her support and maintenance." *Rariden* v. *Rariden*, 33 Ind. App. 284, 285, 70 N.E. 398 (1904); see also *Ceiga* v. *Ceiga*, 114 Ind. App. 205, 210, 51 N.E.2d 493, 495 (1943); *cf. Wallace* v. *Wallace*, 123 Ind. App. 454, 464-465, 111 N.E.2d 90, 92 (1953). A second line of cases derives its authority from the decision of the Indiana Supreme Court in *Shula* v. *Shula*, 235 Ind. 210, 214-215, 132 N.E. 2d 612, 614 (1956):

> "Alimony is awarded in Indiana for the purpose of making a present and complete settlement of the property rights of the parties. It does not include future support for the wife, nor is it intended as a medium for providing financial compensation for injured sensitivities during marriage. The primary factor in fixing the alimony is the existing property of the parties. However, other facts which the court may

* We do not view as significant the characterization of the obligation as alimony in the California judgment or the 1971 judgment of the court in this case, not only because in Indiana the term "alimony" does not seem to carry its usual meaning, but also because the issue of whether the "alimony" payments served to divide marital property not described in the agreement or were based on a disparity in the incomes of the parties had not been raised at the time those judgments were entered.

> consider are the source of the property, the income of the parties and the nature of the abuse inflicted upon the wife,—particularly if that abuse affected the earning capacity of the wife and would have been the basis for an action in damages except for the fact of the marriage."

See also *Doner* v. *Doner*, 302 N.E.2d 511, 512 (Ind. App. 1973); *Sidebottom* v. *Sidebottom*, 140 Ind. App. 657, 662, 225 N.E.2d 772, 775 (1967), *rev'd on other grounds*, 249 Ind. 572, 233 N.E. 2d 667 (1968). While the *Shula* opinion defines alimony as not including "future support for the wife," it nevertheless includes "the income of the parties" among the relevant factors to be considered in awarding alimony, an implicit recognition that the wife's need for support is not to be entirely disregarded. At least three post-*Shula* cases, moreover, have suggested that an Indiana court should take more into consideration in awarding alimony than relative property rights: In *McDaniel* v. *McDaniel*, 245 Ind. 551, 558, 201 N.E. 2d 215, 218 (1964), the court, while reaffirming the *Shula* precedent, stated nevertheless that "it is the basic concept of alimony that such payment be made in lieu of a wife's right to the continued support of her husband." In *Smith* v. *Smith*, 131 Ind. App. 38, 46, 169 N.E.2d 130, 134 (1960), an appellate court recognized that property rights could be adjusted "without awarding alimony." Finally, in *Wellington* v. *Wellington*, 304 N.E.2d 347, 353 (Ind. App. 1974), the appellate court concluded that "alimony serves a dual purpose—a method to aid in the equitable distribution of property and a method to provide continued maintenance or support if deemed appropriate." See also Note, "Indiana's Alimony Confusion," 45 *Ind. L. J.* 595, 601-603 (1970).

It thus appears that one proper consideration, among others, for an award of alimony in Indiana is the relative income of the wife. An allocation to the wife on that basis is tantamount to an allowance for support.

The question remaining is the basis for the alimony payments in issue. The obligation to make those payments had its inception in the "Property Settlement Agreement," which, as we said above, the divorce decree describes as an agreement "to divide all of the marital property" and

approves as "a fair and equitable division of the marital property." This language in the decree, without more, would support an inference that the agreement served only to divide the marital property. But since the decree also incorporates by reference the entire agreement, we must consider the agreement itself as if it were part of the decree; and the agreement leaves room for an inference that the alimony payments were not a part of the division of the marital property. As we have noted, the agreement allocates specifically described real estate, securities, automobiles, insurance policies, and other property between the parties; provides for cross-payments of cash adjustments specifically related to items of the allocated property; and then provides for the alimony payments in question here, as well as additional alimony payments which differ from those before us because they are terminable upon the wife's remarriage. The argument could thus reasonably be made that the marital property is divided in the portion of the agreement which purports to do so, and that the alimony payments are intended to balance the incomes of the parties. We cannot conclusively determine that this is the case, however, because the agreement does not state whether the property described and allocated therein is all the marital property. It is, therefore, impossible to determine on the record before us whether the alimony provision represents a division of other marital property not described in the agreement, in which case it would be dischargeable in bankruptcy, or whether it was not intended to be a division of property but was instead based on the incomes of the parties, in which case it would not be dischargeable.

The case having been decided by what amounts to a summary judgment, we remand to the District Court with directions to vacate the judgment and try the issue of whether the alimony awarded under paragraph 11 of the agreement represented a further division of marital property or was based on the incomes of the parties. The transcript of the divorce hearing, if one exists, and other evidence of the parties' intentions should be considered. Of greatest significance will be evidence of the existence or nonexistence of other marital property not specifically described and allocated in the agreement.

The District Court also allowed interest and attorneys' fees. While the only authority on the point relates to tax claims, 1A *Collier on Bankruptcy* ¶17.14[a], at 1626 (1975), we believe interest on a non-dischargeable debt takes on the character of the debt itself and is therefore not discharged. Attorneys' fees, however, when awarded by a court other than the divorce court in an action to collect unpaid alimony installments, can hardly be considered alimony, since only the divorce court could award alimony. Any judgment entered on remand, therefore, should not include attorneys' fees.

REMANDED WITH DIRECTIONS.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4159—The Scheffer Press, Inc., Chicago, Illinois—1-6-76—250

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois

(ARGUED SEPTEMBER 12, 1977)

DECIDED SEPTEMBER L3, 1977

BEFORE

Hon. Thomas E. Fairchild, Chief Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. Philip W. Tone, Circuit Judge

BENTON M. HENSLER, Defendant-Appellant, vs. NO. 76-2199 MARY LEE NICHOLS, Plaintiff-Appellee.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division NO. IP 72 C 445 CALE J. HOLDER, Judge.

O R D E R

The Court, having read the briefs, addressed itself to the record, and heard oral argument in behalf of appellant, ammounced in open court that the judgment appealed from is AFFIRMED.

The Court concludes that there is support in the record for the district court's finding that the payments in issue were intended as support for the wife rather than as a part of the division of property between the parties, and that finding is not clearly erroneous.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.